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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 88

M. DORSKY,

Petitioner,

vs.

BRADLEY G. BROWN, LICENSE INSPECTOR,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mr. Dorsky, Respectfully Petitions this Honorable Court for a Writ of Certiorari directed to the Supreme Court of the State of Alabama.

Question Presented

Whether a state privilege or license law, which attempts to levy a license tax on each coin-operated radio receiving set is violative of and repugnant to the Commerce Clause of the Constitution of the United States (R. 32, No. 12).

Summary Statement of Matter Involved

The Petitioner, M. Dorsky, instituted this proceeding in the Circuit Court, in Equity, of Jefferson County, Alabama, against Bradley G. Brown, as License Inspector of Jefferson County, Alabama, the respondent, seeking a declaratory judgment as to the constitutional validity of the privilege tax or license imposed on each coin-operated radio receiving set by Act 688, of the General Acts of the Regular Session of the 1947 Legislature of Alabama. The petition also sought an injunction restraining Brown from collecting the tax imposed by said Act 688 on such radios (R. 3). The pertinent and applicable part of said Act No. 688 is as follows:

> "Sec. 613. *Vending Machines*—For each machine for vending gum, candy, soft drinks, ice cream, coffee, pop corn, food of any kind, drink of any kind, pencils, handkerchiefs, combs, drinking cups, cigarettes or other tobacco products, or other articles of merchandise, and for each machine for use in testing strength or grip, shining shoes, making or developing photographs, recording the voice or other sound, and each coin-operated radio, and each coin-operated machine by which a person is weighed, and each coin-operated machine for use in entertainment or skill, and each coin-operated machine on which music is played, and each location, establishment, or place of business receiving much (Music) transmitted by wire or cable from any central point or studio whether such point or studio is situated within or without such location, establishment, or place of business: $1.00 for each machine that may be operated by pennies: $8.00 for each machine that may be operated by nickels or coins of a larger denomination; and a separate license shall be issued for each such machine that may be operated by pennies, nickels, or coins of a larger denomination, which license shall be prominently displayed on or immediately near to such machine; except that hotels,

motels, tourist camps, or other places of business having less than five (5) coin-operated radios, $8.00; and for each such radio in excess of four (4) $2.00 each;—Provided further that no license shall be required under this section for home type merchandise vending machines placed in private homes for home use only and not for public use;—"

The cause was submitted on the bill of complaint as amended and on agreed statement of facts (R. 26-28). The Court entered a decree denying generally the relief prayed for.

The petitioner duly and legally appealed from said decree to the Supreme Court of Alabama (R. 29).

The Supreme Court of Alabama (majority opinion) rendered March 1, 1951 affirmed the decree of the lower court (R. 33).

The dissenting opinion of Mr. Chief Justice Livingston which sufficiently stated the facts and the point of law involved, held the attempt to impose an occupational tax on coin-operated radios to be unconstitutional and void (R. 36-42).

It was agreed that the coin-operated radios involved were installed in guest rooms of the Molton, Bankhead and Thomas Jefferson Hotels in Birmingham, Alabama; that they were owned and serviced by petitioner, M. Dorsky; that the coin-operated radio when in use is plugged into the wall socket in the same manner as any floor lamp or home radio. The insertion of a coin in a slot turns on the electric current and permits radio reception. It was further agreed that similar radios without the coin slot, in which a key turned the current on, were used in similar hotels and were not subject to any license tax; and, further, that the hotels paid the privilege tax on all rooms in hotels. It was agreed that the user of such radio had no control over the programs received (R. 26-28).

Jurisdictional Statement

United States Supreme Court Rule 38, Section 5 (a) provides for a review by the Supreme Court of the United States "where a State Court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court".

Petitioner contends that, under the provisions of United States Supreme Court Rule 38, there are special and important reasons why the writ of certiorari be granted in this case, in that the courts of last resort of the State of Alabama have decided substantial Federal questions not theretofore determined by this Court or in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

Reasons Relied On for the Allowance of the Writ

Communications by radio constitute interstate commerce. *Gibbons* v. *Ogden,* 9 Wheat 1, 6 L. Ed. 23; *Fishers Blend Station, Inc.* v. *Tax Comm.* 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956.

The tax here involved is levied on the business of operating instrumentalities of reception. No attempt is made in the tax act (supra) to apportion the tax or to separate intrastate communications from interstate communications and to levy the tax on intrastate communications only.

Radio receiving sets are essential instrumentalities of interstate commerce. *Station WBT* v. *Poulnot,* 46 F. 2nd 671, cited in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250; 58 S. Ct. 546, 82 L. Ed. 823, 115 ALR 944. If the reception of interstate communication can be taxed in Alabama, the same communications received in other states may be taxed there also.

Interstate Commerce cannot be taxed directly by the States. *Freeman* v. *Hewit,* 329 U. S. 249, 67 S. Ct. 274, 276,

91 L. Ed. 265, also *Joseph, Comptroller* v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422, 67 S. Ct. 815, 819, 91 L. Ed. 993.

> "What makes the tax invalid is the fact that there is interference by a state with the freedom of Interstate Commerce."

The questions presented involve Federal questions of importance worthy of consideration by the Supreme Court of the United States.

Prayer for Writ

WHEREFORE, Your petitioner prays that a writ of certiorari issue by this Honorable Court to the Supreme Court of Alabama, to the end that this cause may be reviewed and determined by this Honorable Court; that the final decree of the Supreme Court of Alabama may be reversed; and that your petitioner be granted such other and further relief in the premises as to this Honorable Court may be deemed just and proper.

Respectfully submitted,

JOHN S. TUCKER, JR.,
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Frank Nelson Building,
Birmingham 3, Alabama,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Supreme Court of Alabama is reported in the Advance Sheet of the Southern Reporter, Vol. 51 (2nd) pp. 360 to 363, inclusive.

The dissenting opinions of Mr. Chief Justice Livingston is reported in Advance Sheet of Southern Reporter, Vol. 51 (2nd) pages 363 to 366, inclusive. Pertinent parts of the opinions are shown on Pages 33-43, inclusive, of the Record.

Jurisdiction

The jurisdiction of this Court, is invoked under the provisions of Section 237 (b) of the United States Judicial Code as amended by Act of Feb. 13, 1925. The courts of last resort of the State of Alabama have decided a substantial claim of Federal constitutional right adversely to petitioner, in a way not in accordance with the applicable decisions of this court (United States Supreme Court Rule 38).

Statement of the Case

A summary of the facts is given in the petition, pages 2 to 3 inclusive. The petitioner challenges the validity of a privilege or occupational tax imposed by an act of the Legislature of Alabama on radio receiving sets having a coin-slot, on the grounds that such radio receiving set is an instrument of Interstate Commerce, and the tax is invalid as violative of the commerce clause of the Federal Constitution (Article 1, Section 8, Cl. 3 of the Constitution of the United States).

Argument

Petitioner waives all arguments, and assignments of errors, etc., presented in the lower courts excepting those

pertaining to the validity of such tax on radio receiving sets as an instrument of interstate commerce, or violative of the Constitution of the United States.

In holding that a privilege or occupational tax on such radio receiving sets is valid, the Supreme Court of Alabama (majority opinion) cited its opinion in the *Sanford* v. *City of Clanton* case reported in 31 Ala. app. 253, 15 So. 2nd 303 and 15 So. 2nd 309,—"which is the prevailing rule on the question in this jurisdiction". Subsequent to this decision, the Supreme Court of the United States apparently has overruled the *Sanford* v. *City of Clanton* case. *Spector Motor Service, Inc.* v. *O'Connor,* 71 S. Ct. 508. In this case the Supreme Court of the United States held that under the commerce clause, a state cannot levy a tax upon the privilege of carrying on a business that is exclusively *interstate in character,* no matter how fairly the tax is apportioned to business done within the state.

In this case, as it was in the *Spector Motor Service* case, the tax is not collected in lieu of an ad valorem property tax; it is not a fee for an inspection or a tax on sales or use. It is a tax or excise placed—for the privilege of carrying on interstate commerce.

The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the State. *Freeman* v. *Hewit,* 91 L. Ed. 265, 329 U. S. 249, 67 S. Ct. 274, 276, *Joseph Comptroller* v. *Carter & Weekes Stevedoring Company,* 330 U. S. 422, 67 S. Ct. 815, 819, 91 L. Ed. 993.

These radios are all located in hotel rooms where privilege licenses are imposed and collected on each hotel room. There is no element of police inspection involved; the ether waves over which the radio sounds travel is regulated under Federal laws. Congress has preempted this field. *Station WBT* v. *Poulnot* reported in D.C. 46 F. 2nd 671.

The *WBT* v. *Poulnot* case (*supra*) is the only authority on the questions of a state tax on radio receiving sets, and it was held that the radio receiving sets were absolutely essential instrumentalities of interstate commerce, and that the State of South Carolina had no right to levy a license tax on the privilege of owning and operating a radio receiving set in that state.

In the case of *Fishers Blend Station* v. *Tax Commission*, 297 U. S. 650, 655, 56 S. Ct. 608, 610, 80 L. Ed. 956, the U. S. Supreme Court held that a state occupation tax on the receipts of an owner of a radio station from broadcasting programs to listeners within and without the state was invalid.

Simpson v. *Shepard*, 230 U. S. 352, 400, 57 L. Ed. 1511, 33 S. Ct. 729, 48 LRA N.S. 1151.

Where interstate and intrastate commerce are served by the same instrumentalities, a tax applied directly to the privilege of doing the local business may in fact burden the related interstate business.

Pacific Teleph. U. Teleg. Co. v. *Tax Commission*, 297 U. S. 403 80 L. Ed. 760, 56 S. Ct. 522, 105 ALR 1.

Sprout v. *South Bend*, 277 U. S. 163, 72 L. Ed. 833.

> *"The distinction is whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce."*

It is again reiterated that the radio receiving sets owned by petitioner should not be subject to the state privilege license tax.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Supreme Court of Alabama should be granted.

Respectfully submitted,

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APPENDIX "A"

THE SUPREME COURT OF ALABAMA (MAJORITY) OPINION SAID:

" • • • we are not convinced that later cases of the Supreme Court of the United States have detracted from the pertinent principles enumerated in that case (*Sanford* v. *City of Clanton,* 31 Ala. App. 253, 15 So. 2nd 303), which is the prevailing rule on the question in this jurisdiction. Therefore, until there is a clearer pronouncement by the United States Supreme Court on the subject, we prefer to rest on the rule in the Sanford case as controlling.

"We are not convinced beyond reasonable doubt that the statute is unconstitutional and, therefore, affirm the decree of the lower court in so holding."

Mr. Chief Justice LIVINGSTON dissenting:

"But in our opinion that part of Section 613, supra, (ACT 688 of General Acts of 1947 Alabama Legislature, General Acts 1947, page 522, Title 51, Section 613, Pocket Part, Code of Alabama 1940), which attempts to levy a license tax on "each coin-operated radio" is violative of the commerce clause of the Constitution of the United States."

"The tax here involved is levied on the business of operating instrumentalities of reception rather than the business of broadcasting. No attempt is made in Section 613, supra, to apportion the tax or to separate intrastate communications from interstate communications and to levy the tax on intrastate communications only. So in that respect, we are bound to consider the levy as one on interstate communications, or on the business of operating instrumentalities used in interstate communications."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 96.

M. DORSKY,
Petitioner,

vs.

BRADLEY G. BROWN, as License Inspector of Jefferson County, Alabama,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

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